

## Invitation to Comment

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| Title   | Qualifications and Continuing Education of Paralegals Eligible for Compensation From Estates of Decedents, Conservatees, and Wards (amend Cal. Rules of Court, rule 7.703).   |
| Summary | The proposed amendment of rule 7.703 would clarify that paralegals performing services for counsel for fiduciaries in decedents' estates, conservatorships, and guardianships must satisfy the qualification and continuing education requirements of Business and Professions Code section 6450 et seq. for counsel to be eligible for compensation for paralegal services from the estates of decedents, conservatees, and wards. |
| Source  | Probate and Mental Health Advisory Committee<br>Hon. Mitchell L. Beckloff, Chair  |
| Staff   | Douglas C. Miller<br>Senior Attorney<br>Office of the General Counsel<br>Administrative Office of the Courts<br>9415) 865-7535<br>douglas.miller@jud.ca.gov   |

### *Use of paralegals by counsel for fiduciaries*

Probate Code sections 2640(c) and 2642(a) govern the compensation of legal counsel for conservators or guardians to be paid from the estates of conservatees or wards. Probate Code section 10811(b) concerns compensation payable from a decedent's estate for extraordinary legal services by legal counsel for the estate's personal representative.<sup>1</sup> These code sections have identical provisions that include the services of paralegals for the attorney within the request for the attorney's compensation and require that the petitioner (either the fiduciary or the

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<sup>1</sup> The statutory fee for ordinary legal services for the attorney for the personal representative of a decedent's estate—standard services that usually must be performed in every estate—is a fixed percentage of the value of the estate plus estate income and net gains or losses on the sale of assets. This fee is not based on the time spent in performing the services or on the specific experience or qualifications of the attorney or paralegal performing them. But compensation for extraordinary legal services for the personal representative of a decedent's estate and for all legal services for a conservator or guardian is not fixed by statute. Fees for such services are generally based on the time spent in their performance and the experience and other qualifications of the persons performing them.

fiduciary's attorney) specify the time spent and services performed by the attorney's paralegal.

Rules 7.703(e) and 7.754 of the California Rules of Court, adopted effective January 1, 2003, implement the Probate Code provisions concerning compensation of attorneys who use paralegals. Rule 7.703(e)(1) requires that requests for compensation for a paralegal's services included in an application for an award of extraordinary fees in a decedent's estate describe the qualifications of the paralegal (including education, certification, continuing education, and experience). Rule 7.754 incorporates this requirement into requests for an attorney's compensation for paralegal services in a guardianship or conservatorship.

#### *Qualifications of paralegals*

Business and Professions Code sections 6450–6456, enacted in 2000,<sup>2</sup> establish qualifications and continuing education requirements for paralegals employed by or under contract with attorneys, and working under their supervision. The minimum qualification of a paralegal is specified in section 6450(c) to be at least one of the following:

1. A certificate of completion of a paralegal program approved by the American Bar Association;
2. A certificate of completion of a paralegal program at, or a degree from, an accredited college or university meeting certain requirements;
3. A bachelor's or higher degree in any subject plus at least one year of law-related experience under the supervision of an attorney who has at least three years' practice experience and is an active member of the State Bar of California or a federal attorney practicing in this state, plus the written declaration from the supervising attorney stating that the paralegal is qualified to perform paralegal tasks; or
4. A high school or GED equivalent diploma plus at least three years of law-related experience under the supervision of an attorney who has at least three years' practice experience and is an active

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<sup>2</sup> Stats. 2000, ch. 439 (Assem. Bill 1761), § 1. This legislation contained two versions of section 6450, the main provision of the bill containing the paralegal qualifications. The first version was repealed by its terms effective January 1, 2004; the second version became effective on that date. This invitation to comment addresses only the second version of section 6450, the currently effective version.

member of the State Bar of California or a federal attorney practicing in this state, plus the written declaration from the supervising attorney stating that the paralegal is qualified to perform paralegal tasks. This experience must be completed no later than December 31, 2003.

Business and Professions Code section 6450(d) requires that every person working as a paralegal must certify with his or her supervising attorney that during every two year-period beginning January 1, 2007, he or she has completed four hours of continuing legal education in legal ethics and four hours in either general law or in an area of specialized law. The education must meet the standards of mandatory attorney continuing education. The paralegal must maintain a record of his or her continuing education certifications.

The advisory committee received a request to develop a Judicial Council form for petitioners to use to show a paralegal's qualifications and education under section 6450 in support of a request for an award of an attorney's compensation in a conservatorship that includes services by the paralegal. This request necessarily assumed that the attorney cannot be compensated for the services of a paralegal whose qualifications are not disclosed (or if disclosed, do not meet the minimum requirements of section 6450) or whose satisfactory completion of the continuing education requirements of that section is not demonstrated. Rules 7.703 and 7.754 do not explicitly refer to section 6450 and do not specify the consequences of a paralegal's failure to satisfy that section.

The advisory committee was directed to three federal cases under the Americans With Disabilities Act from the Eastern District of California. These cases involved requests under that law for plaintiffs' attorney's fees against the defendants that included claims for compensation for paralegal services. The courts referred to section 6450 and declined to include fee awards for services of paralegals who did not comply with the requirements of that section on the assumption that section 6450 requires this result.<sup>3</sup>

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<sup>3</sup> See *Sherri White v. GMRI, Inc., dba Red Lobster*, No. CIV. S-04-0620-WBS-KJM (E.D. Cal. 2006), 2006 U.S. Dist. LEXIS 22200 (motion for reconsideration denied on procedural grounds on request for compensation for paralegal services originally denied because the paralegal's supervising attorney failed to provide a written declaration that the high school graduate paralegal was qualified to perform paralegal tasks, required by section 6450(c)(4)); *James Sanford v. GMRI, Inc. dba Red Lobster*, No. CIV-S-04-1535-DFL-CMK (E.D. Cal. 2005), 2005 U.S. Dist. LEXIS 27581 (defendant's objections to plaintiff's paralegal's fees partially overruled)

As noted above, Probate Code sections 2640(c), 2642(a), and 10811(b) require disclosure of the time spent by the paralegal and a description of the services he or she performed. The paralegal's compliance with section 6450 is not addressed in these code sections, which were enacted several years before the Business and Professions Code provisions.<sup>4</sup> The Probate Code sections do not require disclosure of the paralegal's qualifications or continuing education, although the rules of court adopted to implement them do require this disclosure.

The Business and Professions Code sections provide for severe sanctions for noncompliance.<sup>5</sup> But they do not specifically state that an attorney may not be compensated for the services of a paralegal who is not shown in the attorney's fee request to have satisfied the qualification requirements (including the supporting declaration of the supervising attorney when required) or completed the required continuing education.

There is evidence, however, that the Legislature contemplated that a paralegal involved in a fee request under Probate Code sections 2640, 2642, or 10811 must meet the requirements of the Business and Professions Code. A Senate floor analysis of the original paralegal legislation states:

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and partially sustained on application of the provisions of section 6450); and *Tony Martinez v. G. Maroni Co., dba Church's Chicken, etc., et al*, No. CIV. S-06-1399-DFL-GGH (E.D. Cal. 2007) 2007 U.S. Dist. LEXIS 32366 (fees for paralegal services challenged on grounds that the paralegals did not meet the qualifications of section 6450 and that the services performed were secretarial, not supportable at a paralegal's higher hourly rate. The court concluded that the paralegals satisfied the qualifications of section 6450 but sustained the defendant's claim that the services performed were secretarial).

<sup>4</sup> The provisions concerning paralegals in Probate Code sections 2640 and 2642 were enacted in 1990, effective July 1, 1991, at the time of repeal and reenactment of the entire Probate Code (Stats. 1990, ch. 79 (Assem. Bill 759), § 14). Probate Code section 10811, including its provisions concerning paralegals in section 10811(b), was enacted in 1991 and also became effective on July 1, 1991 (Stats. 1991, ch. 82 (Assem. Bill 896), § 30). See footnote 2 above at page 2.

<sup>5</sup> Section 6451 says that it is unlawful for a paralegal to perform services for a consumer except under the direction and supervision of the attorney or other entity employing or contracting with the paralegal, and section 6452(a) provides that it is unlawful for a person to identify himself or herself as a paralegal on advertisements, letterheads, and the like, unless he or she satisfies the requirements of section 6450 and performs all services under the direction of an attorney who is responsible for the services performed by the paralegal. Violations of these provisions are infractions or misdemeanors under section 6455(b). Section 6452(b) provides that the attorney using a paralegal is liable for the harm caused by the paralegal's negligence, misconduct, or violation of sections 6450–6456. Section 6455 provides that a consumer injured by a violation of these sections may file a complaint and seek relief in the superior court for injunctive relief, restitution, and damages, including attorneys fees in that action if the consumer prevails.

Existing law permits an attorney to include compensation paid for services performed by a “paralegal” when petitioning the court for fees for various services under the Probate Code. There is no definition of “paralegal” in existing law, rule of court, or rules of the State Bar of California.<sup>6</sup>

This statement supports an inference that the paralegal legislation in the Business and Professions Code was intended to establish the minimum qualifications of paralegals whose services may be considered in requests for fees “for various services under the Probate Code.” Business and Professions Code section 6450(a) defines a paralegal in part as a person “who is qualified by education, training, or work experience . . . .” Thus, a person without the education, training, or work experience required by section 6450 would not be considered a “paralegal” within the meaning of the law, including the provisions of the Probate Code that authorize payment for his or her services.

Based on this analysis, the advisory committee concluded that the Business and Professions Code provisions define paralegals whose services may be compensated from a decedent’s estate, guardianship, or conservatorship under the relevant Probate Code provisions and rules 7.703 and 7.754. Thus, a guardian or conservator applying for an award of his or her attorney’s fees from the ward’s or conservatee’s estate, a personal representative applying for an award of the estate attorney’s extraordinary fees from the decedent’s estate, or the fiduciary’s attorney seeking such fees directly, must show that the paralegal satisfies the initial qualifications required under Business and Professions Code section 6450(c). This showing includes a written declaration by the paralegal’s supervising attorney (who must have at least three years of practice experience) stating that the paralegal who is qualified as a college or high school graduate under sections 6450(c)(3) or (4) is qualified to perform paralegal tasks, and—if the paralegal is a high school graduate—a showing that the paralegal’s three-year law-related work experience was satisfied before 2004.

The showing must also demonstrate that the paralegal has satisfied the continuing education requirements of section 6450(d). This section requires the paralegal to complete eight hours of continuing education qualified as continuing legal education under Business and Professions

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<sup>6</sup> Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1761 (1999–2000 Reg. Sess.) as amended in the Senate Aug. 18, 2000, par. 1.

Code section 6070 in every two-year period beginning January 1, 2007, including four hours in legal ethics and four hours in general law or in an area of specialized law.

*Rule 7.703*

The advisory committee proposes an amendment of rule 7.703(e) that would clarify that the currently-required showing of the paralegal's qualifications, certification, continuing education, and experience must include showings that the paralegal is qualified under Business and Professions Code section 6450(c) and that he or she has completed mandatory continuing legal education required under section 6450(d) "for the last two-year certification period ending before the year during which any part of the paralegal's services were performed."

Rule 7.754 expressly applies the provisions of rule 7.703(e) concerning paralegals to requests for fees for a fiduciary's attorney in a guardianship or conservatorship. Changes in rule 7.703(e) would become applicable to such fees without changing the text of rule 7.754.

Because the Business and Professions Code provisions concerning paralegals are currently in effect and the first biennial period for reporting continuing education ends on December 31, 2009, this proposal is circulated for public comment in the winter comment cycle, for possible council action effective July 1, 2010, rather than the normal effective date of January 1, 2011, for changes in rules and forms proposed to the council in calendar 2010.

Despite the initial request for a form to show compliance with section 6450, the advisory committee does not believe a form is necessary. In ordinary practice, the fee request would be supported by an attorney-drafted declaration. This document could readily be expanded to include all of the showings required by the Business and Professions Code provisions. If the attorney requesting fees or supporting the fee request of his or her fiduciary client is not the paralegal's supervising attorney and the supervisor's declaration is required, that declaration could easily be added to the fee request as a supplemental declaration.

The advisory committee solicits comments concerning the need or utility of a Judicial Council form for this purpose.

The text of amended rule 7.704 follows this invitation to comment.

Rule Proposal

Rule 7.703 of the California Rules of Court would be amended, effective July 1, 2010, to read as follows:

1 **Rule 7.703. Extraordinary compensation**

2  
3 (a)—(d) \* \* \*

4  
5 (e) **Use of paralegals in the performance of extraordinary services**

6  
7 Extraordinary legal services may include the services of a paralegal as  
8 defined in Business and Professions Code section 6450(a) acting under the  
9 direction and supervision of an attorney- only if the A request for  
10 extraordinary legal fees for a paralegal's services ~~must~~:

11  
12 (1) Describes the qualifications of the paralegal (including education,  
13 certification, continuing education, and experience). The description  
14 must show that the paralegal:

15  
16 (A) Acted under the direction and supervision of the attorney;

17  
18 (B) Satisfies one or more of the minimum qualifications specified in  
19 Business and Professions Code section 6450(c), including, if  
20 applicable, the attorney's declaration of the paralegal's  
21 qualifications under sections 6450(c)(3) or (4), and

22  
23 (B) Has completed mandatory continuing education required by  
24 Business and Professions Code section 6450(d) for the last two-  
25 year certification period ending before the year during which any  
26 part of the paralegal's services were performed;

27  
28 (2)—(5) \* \* \*

## Item W10-07 Response Form

**Title:** Qualifications and Continuing Education of Paralegals Eligible for Compensation From Estates of Decedents, Conservatees, and Wards (amend Cal. Rules of Court, rule 7.703).

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: \_\_\_\_\_

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**Name:** \_\_\_\_\_ **Title:** \_\_\_\_\_

**Organization:** \_\_\_\_\_

- Commenting on behalf of an organization

**Address:** \_\_\_\_\_

**City, State, Zip:** \_\_\_\_\_

### **To Submit Comments**

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

**Internet:** <http://www.courtinfo.ca.gov/invitationstocomment/>

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| <b>DEADLINE FOR COMMENT:</b> 5:00 p.m., Friday, January 22, 2010 |
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*Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.*